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DOURIN MURAH

v.

PP

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COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHAMAD ARIFF YUSOF JCA
DAVID WONG DAK WAH J
[CRIMINAL APPEAL NO: S-05-180-2010]

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15 FEBRUARY 2013

CRIMINAL LAW: *Murder - Defence - Non-insane automatism - Whether defence passed threshold test at trial - Whether accused proven aware of nature of acts - Whether expert evidence adduced on mental condition of accused - Penal Code, ss. 84 & 302*

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The appellant was charged with an offence of murder under s. 302 of the Penal Code for the murder of one Datirin Julani ('the deceased'). SP8 and SP9, upon hearing the sound of gunshot, rushed towards the direction of the gunshot noise and saw the appellant pointing a '*bakakok*', a homemade shotgun, firing a shot at the deceased. The appellant thereafter confronted PW10 and PW11, the daughter and son-in-law of the deceased, and threatened them with violence. On the same day, the appellant had hit PW12 with the *bakakok* he was carrying, resulting in her losing consciousness. The post mortem on the body of the deceased showed that the death was caused by 'gunshot injury to the head' and that there were two gunshot wounds. Having found that the charge against the appellant had been proven beyond reasonable doubt, the learned trial judge had accordingly convicted and sentenced the appellant to death. Aggrieved with the conviction, the appellant appealed. During the oral submission, the appellant relied solely on the defence of non-insane automatism in support of his ground of lack of intention on the part of the appellant in the commission of the offence.

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Held (dismissing appeal)
Per David Wong Dak Wah J delivering the judgment of the court:

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(1) The defence of non-insane automatism was never raised during the trial. In the circumstances, the appellant had failed to pass the threshold test of putting some proof of his insanity during trial. (para 17)

(2) The evidence that the appellant alluded to as evidence of insanity during trial, *ie,* that the deceased had casted a spell on the appellant causing the appellant to be abnormal, must be viewed in light of his other behaviours. The evidence of PW8 and PW9 was quite clear in that the appellant shot the deceased point-blank not once but twice while he was on the ground asking for mercy. The appellant had also confronted PW10 and PW11 and threatened them with violence and had hit PW12 resulting in her being unconscious. These behaviours showed that the appellant knew exactly the nature of what he did to the deceased and others. (para 18)

(3) The defence of non-insane automatism also requires the calling of expert medical evidence to enlighten the court of the mental condition of the appellant. In the absence of such evidence before the court, the appellant could not avail himself of the defence provided for under s. 84 of the Penal Code. (para 18)

Bahasa Malaysia *Translation of Headnotes*

Perayu dituduh dengan satu kesalahan membunuh di bawah s. 302 Kanun Keseksaan kerana membunuh seorang yang bernama Datirin Julani ('si mati'). SP8 dan SP9, setelah mendengar bunyi tembakan, bergegas ke arah bunyi tembakan tersebut dan melihat perayu mengarahkan '*bakakok*', sebuah senapang patah buatan sendiri, menembak si mati. Perayu selepas itu mencabar PW10 dan PW11, iaitu anak perempuan dan menantu si mati, dan mengugut mereka dengan kekerasan. Pada hari yang sama, perayu telah memukul PW12 dengan '*bakakok*' yang dibawanya, menyebabkannya jatuh pengsan. Bedah siasat mayat si mati menunjukkan bahawa kematian disebabkan oleh 'kecederaan tembakan di kepala' dan terdapat dua luka tembakan. Selepas mendapati bahawa pertuduhan terhadap perayu telah dibuktikan melampaui keraguan munasabah, yang arif hakim bicara telah sewajarnya mensabitkan dan menjatuhkan hukuman mati ke atas perayu. Terkilan dengan sabitan tersebut, perayu merayu. Semasa penghujahan lisan, perayu bersandarkan semata-mata atas pembelaan ketidaksempurnaan akal dalam menyokong alasan ketiadaan niat oleh perayu dalam melakukan kesalahan tersebut.

Diputuskan (menolak rayuan)
Oleh David Wong Dak Wah H menyampaikan penghakiman mahkamah:

(1) Pembelaan ketidaksempurnaan akal tidak pernah dibangkitkan semasa perbicaraan. Dalam keadaan tersebut, perayu telah gagal melepasi ujian ambang untuk mengemukakan bukti ketidakwarasannya semasa perbicaraan.

(2) Keterangan bahawa perayu merujuk kepada keterangan ketidakwarasan semasa perbicaraan, iaitu, bahawa si mati telah menggunakan sihir ke atas perayu menyebabkan perayu tidak normal, mesti dipertimbangkan dengan kelakuannya yang lain. Keterangan PW8 dan PW9 adalah amat jelas di mana perayu menembak si mati dari jarak dekat bukan sekali, tetapi dua kali sementara si mati terbaring memohon simpati. Perayu juga telah mencabar PW10 dan PW11 dan mengugut mereka dengan keganasan serta memukul PW12 sehingga dia jatuh pengsan. Tindakan-tindakan ini menunjukkan bahawa perayu mengetahui dengan jelas apa yang dia buat kepada si mati dan yang lain-lain.

(3) Pembelaan ketidaksempurnaan akal juga memerlukan keterangan pakar perubatan dipanggil untuk menjelaskan kepada mahkamah keadaan mental perayu. Dalam ketiadaan keterangan sedemikian di mahkamah, perayu tidak boleh bergantung atas pembelaan yang diperuntukkan di bawah s. 84 Kanun Keseksaan.

Case(s) referred to:
Abdul Razak Dalek v. PP [2010] 6 CLJ 357 FC ***(refd)***
John Nyumbei v. PP [2007] 2 CLJ 509 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 84, 302

For the appellant - Hamid Ismail; M/s Hamid & Co
For the respondent - Lailawati Ali; DPP

[Appeal from High Court Sabah & Sarawak, Kota Kinabalu; Criminal Trial Suit No: K45-06-2009]

Reported by S Barathi

JUDGMENT

David Wong Dak Wah J:

Introduction

[1] The appellant was charged in the High Court of Kota Kinabalu for the offence of murder punishable under s. 302 of the Penal Code. The charge reads as follows:

> That you, on the 12th July 2008, at about 1.00 p.m., at the rubber plantation, at Kg. Tenggulun Jaya Sook, in the District of Keningau, in the state of Sabah, did commit murder by causing the death of one DATIRIN BIN JULANI (M), 52 years old and that you have thereby committed an offence punishable under section 302 of the Penal Code.

[2] At the end of the trial the learned judge found the charge had been proved beyond reasonable doubt against the appellant. He then accordingly convicted the appellant of the charge of murder and sentenced him to the mandatory death penalty prescribed by law. Aggrieved with the conviction, the appellant appealed to this court. Having heard this appeal, we unanimously dismissed the appeal and now give our reasons for the decision.

Factual Background

[3] The facts of this appeal are these. On the morning of the fateful day, the deceased was at his farmhouse with his wife (PW9), PW8 and their three daughters. During that morning, his son, namely, Mustaain bin Datirin (PW6) came over to his farmhouse to inform the deceased that the appellant was angry with him and fearing that something bad might happen, he left the farmhouse on his own motorcycle carrying a parang. Not long after the deceased left the house, PW9 heard the sound of a gunshot, upon which she and PW8 rushed towards the direction of gunshot noise. As they were neared the place, they saw the appellant pointing a 'Bakakok' (homemade shotgun) and firing a shot at the deceased. It was the testimony of PW9 that the deceased then was laying on the ground with his left hand raised and facing the appellant. Upon seeing what happened, both PW8 and PW9 ran away from the place.

[4] The gunshot sound was also heard by one of the deceased's daughter (PW10) and his son-in-law (PW11). On their way back after collecting latex from the rubber trees, they had stopped at a farm to collect firewood. As they were preparing to go home, they

heard a gunshot sound coming from the direction of the deceased's farmhouse, upon which they proceeded to the place on a motorcycle driven by PW11. Along the way they met the appellant.

[5] PW10 and PW11 asked the appellant "why?" ("nokuroh" in Dusun dialect) to which the appellant's response was to point his finger at PW10 and angrily said to her "you are the descendant of a black magician" ("ikoyu turunan do monindaat" in Dusun dialect). PW10 then asked the appellant who had casted a spell on him to which he said it was her father.

[6] PW10 then asked the appellant what proof he had for making such accusation which made the appellant angrier saying to PW10 "Oh, kamu anak perempuan dia yang berani macam lelaki". At the same time he shoved the bakakok against her right waist causing her to fall on her buttocks and then fired a shot very close to her leg. PW11 tried to pacify the appellant but the appellant pointed the bakakok at him instead.

[7] Then the appellant told PW10 and PW11 to check on the deceased who was laying down a little distance away. When PW10 and PW11 saw the deceased, he was laying face down with blood on his head and body. On realising that the deceased was dead, PW11 placed a cap on the deceased's face.

[8] As the appellant was still very angry at that time, PW10 pleaded with the appellant not to harm them telling him that they had a young child and told him that she accepted the manner in which her father had met his death. This calmed down the appellant a little. Thereafter he asked PW10 to get her father's bakakok from the house and give to him. Both PW10 and PW11 complied with the request and upon leaving the appellant warned both PW10 and PW11 by saying "tengoklah kamu akan menderita."

[9] PW12's testimony is that on the fateful day at about 2pm she met the appellant who was riding a motorcycle. On seeing her, the appellant stopped and alighted from the motorcycle and said to PW12 "kau lagi" and straight away hit her with the bakakok he was carrying. PW12 shouted for help but the appellant hit her again with the bakakok two more times and she passed out. Later someone brought her to her house before sending her to the hospital.

[10] The testimony of Dr Jessie Hiu @ Jessie (PW4), who was the forensic pathologist who performed the post mortem on the body of the deceased, is simply that the deceased death was caused by "Gunshot injury to the head" - see Post Mortem Examination Report (P.14). She confirmed that the deceased sustained two gunshot wounds, one on the left side of the neck and the other in the abdomen. The shot on the neck was directed upward towards the head causing severe fracture of the skull and lacerations of the brain with seven pellets found within the brain matter and one pellet on the scalp. This injury according to her would cause immediate death.

Finding By The High Court

[11] From the grounds of the learned judge, it can be seen that his finding of a *prima facie* case was premised on his acceptance of the credibility of the witnesses called by the prosecution. This is what the learned judge said:

> Whether *prima facie* case established
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> Having given maximum evaluation to the evidence of the prosecution, particularly the testimonies of PW8, PW9, PW10, PW11 and PW4 it is clear to me that the prosecution has adduced sufficient credible evidence to prove each ingredient of the offence which if unrebutted or unexplained would warrant the accused's conviction. I accept the evidence of PW8, PW9, PW10 and PW11 on what transpired before, during and after the deceased was shot dead. Likewise I accept the expert opinion of PW4 that two shots were fired at the deceased and that the gunshot injury to the head was fatal. The evidence of PW8 and PW9 shows beyond any doubt that it was the accused who caused the injury to the deceased's head. The accused's intention when he fired the fatal shot must have been to cause death. Accordingly I called upon the accused to enter his defence.

[12] Having reviewed the learned judge's finding in light of the evidence in its totality, we are in agreement that the learned judge was perfectly correct in calling the appellant to enter his defence. We also add that the learned judge had complied with what was required in the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203 which states as follows:

> (I) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable

A inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(II) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I B prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "NO" then, a *prima facie* case has not been made out and the accused should be acquitted;

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Defence

[13] The appellant had put up a defence of misfortune and this was rejected by the learned judge for the following reasons:

D I find no truth whatsoever in this defence, for the following reasons:

(1) One shot may be an accident but not two.

(2) The accused's claim that the deceased was armed with a shotgun is E contradicted by PW8 and PW9. There is therefore no question of the deceased pointing any gun at him.

(3) The accused's claim that his bakakok exploded and hit the deceased as he was running towards the deceased while F holding the bakakok under his right arm pit (kepit dengan tangan kanan) is inherently incredible. It has to be a wild imagination conjured up by the accused to prop up his defence.

(4) It is too much of a coincidence that his bakakok was G pointing directly towards the deceased, who was 30 metres away, when it suddenly exploded.

(5) Before the second shot was fired the accused pointed the bakakok at the deceased as testified by PW8 and PW9. Aiming the gun at the deceased and then firing a shot cannot H by any stretch of the imagination be an accidental act.

(6) It is highly improbable that the second shot could hit the deceased's neck if, as claimed by the accused, he was in the act of grabbing and pulling away the gun from the deceased I when it exploded.

(7) The deceased allegedly aimed his gun at the accused when they crossed path. This if true would be reason enough for the accused to fire at the deceased deliberately in self defence rather than for the gun to fire accidentally.

(8) The accused was very angry with the deceased and was still angry after the shooting as testified by PW10 and PW11. An angry man is more likely to act with deliberation.

As for the trustworthiness of the accused as a witness I do not find him to be a credible witness at all.

Contentions By The Appellant

[14] Learned counsel for the appellant in his submission had raised two grounds which are as follows:

1. The prosecution had failed to prove that the Appellant had the intention to kill or cause the death of the deceased.

2. The trial Judge was wrong not to have considered at the end of trial whether the Appellant had the intention to kill or cause the death of the deceased.

[15] However during oral submission, counsel for the appellant relied solely on the defence of non-insane automatism and referred to the case of *Abdul Razak Dalek v. PP* [2010] 6 CLJ 357; [2010] 4 MLJ 725 to support his ground of the lack of intention on the part of appellant in shooting the deceased. That being the case, we adjudicated this appeal solely on the contention that the appellant had suffered from non-insane automatism at the time of the commission of the offence.

[16] The principle of law on this sort of defence is succinctly set out in the case of *John Nyumbei v. PP* [2007] 2 CLJ 509 which at pp. 516-517 held as follows:

10. The law on unsoundness of mind as a complete defence in our criminal jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s. 84 of the Penal Code. It states:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

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11. This section exempts a person found to be insane of any criminal responsibility if it is found that he is "incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law" (see commentary in *Ratanlal and Dirajlal's Law of Crimes*, 25th edn, p 280). The learned authors there further commented that a person "is not protected if he knew that what he was doing was wrong, even though he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know that it was wrong.

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12. Thus, under s. 84 Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.

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13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s. 84 Penal Code. The specie of insanity addressed by s. 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s. 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes*, 25 edn. p. 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *PP v. Muhamad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:

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> It is settled law that the defence of insanity under s. 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v. Zainal Abidin Mohd Zaid* [1993] 1 CLJ 147; *PP v. Misbah Saat* [1998] 1 CLJ 759; [1997] 3 MLJ 495.

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14. When the defence of insanity is raised the court thus needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

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(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law. (see *Ratanlal and Dhirajlal's Law of Crimes*, 5th edn, p. 289 et seq).

15. It is also settled law that the burden of proof rests on the person who raises the defence of insanity (see *Juraimi bin Husin v. PP* [1998] 2 CLJ 383 also *Baharom v. PP* [1960] 1 LNS 9; [1960] 26 MLJ 249). And it is only the accused person who has this right to raise a defence of insanity. It is not open to the court or the prosecution to raise it (see *PP v. Misbah Saat*, *supra*).

16. The standard of proof upon the accused raising the defence of insanity is on a balance of probabilities, as in a civil case (*Rajagopal v. PP* [1976] 1 LNS 122; [1977] 1 MLJ 6, *Goh Yoke v. PP* [1969] 1 LNS 48; [1970] 1 MLJ 63). So, if the appellant here is able to show, either from the prosecution or other evidence that he committed the crime but was at that time insane, he cannot be culpable by virtue of s. 84 Penal Code.

Court Analysis

[17] Firstly it must be pointed out that this defence of non-insane automatism was never raised during trial. This, due to the credit of learned counsel for the appellant, was admitted in his submission. That being the case, it can be said that the appellant had failed to pass the threshold test of putting some proof of his insanity during trial.

Be that as it may, learned counsel for the appellant submitted that there is some evidence of such insanity before the trial court and as such the learned judge should have considered them even though it was not specifically raised as a defence.

[18] Giving the appellant the greatest latitude, we now examine whether the evidence alluded to by learned counsel is adequate to conclude that the defence of non insane automatism had been proved by the appellant. The evidence alluded to was the interchange between PW5 and the appellant who had told PW5 that the deceased had 'guna guna' him and as proof showed PW5 his skin disease. In short, the deceased had casted a spell on the

A appellant which had made him abnormal. This encounter of course must be viewed in light of his other behaviours which are these. The evidence of PW8 and PW9 was quite clear in that the appellant shot the deceased point blank not once but twice while he was on the ground asking for mercy. The deceased also after
B the incident confronted both PW10 and PW11 and threatened them with violence. He had also hit PW12 resulting her being felled unconscious. These behaviours in our view showed that the appellant knew exactly the nature of what he did to the deceased and the others.

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Hence it was our view that the appellant cannot avail himself of the defence provided for under s. 84 of the Penal Code. Furthermore this sort of defence requires the calling of expert medical evidence to enlighten the court the mental condition of
D the appellant. There was no such evidence before the court.

Accordingly for reasons stated above, we dismiss the appeal and affirm the decision of the learned judge.

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